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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

ARIEL POMARES and ANTONIO VECIANA,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ariel Pomares and Antonio Veciana, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered against them on July 5, 1974, which affirmed judgments of conviction previously entered against them in the United States District Court for the Southern District of New York.

Opinion Below

The Court of Appeals affirmed in an opinion dated July 5, 1974, *United States* v. *Pomares*, — F.2d —. The opinion is reproduced as Appendix A to this petition, *infra*, at 1a-8a.*

* References herein to the appendix to the petition are as follows: "—a". References to the Appellants' Appendix, filed with the Court of Appeals, are as follows: "A—".

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on July 5, 1974 (1a).

Questions Presented For Review

1. Where Federal agents repeatedly threaten an arrested defendant that the exercise of his rights to remain silent and to be represented by counsel will work to his disadvantage in the disposition of the charge against him, and the defendant confesses, are his rights under the Fifth and Sixth Amendments of the United States Constitution thereby violated?

2. Should the jury have been charged, as requested by the defense, that if they found the alleged Pomares confession unreliable, they were entitled to completely disregard it?

3. Is a defendant's Fifth Amendment right to remain silent violated when, at a jury trial, the prosecution elicits from a government witness the fact that, following his initial confession, the defendant refused to further "cooperate" with the government?

4. Were petitioners improperly prejudiced by the Government's argument in summation that they should have cooperated with the Government and, if they had done so, the flow of cocaine to the United States would thereafter have been diminished?

5. Were each of the petitioners entitled to separate trials?

6. Did the prosecutor become an unsworn witness against the defendants by arguing facts in summation which had not been shown by the evidence?

7. Was the Government improperly permitted to expand the scope of the indictment to cover crimes not charged and not otherwise revealed to the defense in advance of trial?

Constitutional Provisions Involved

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted wtih the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

On July 23, 1973, in Manhattan, one Augustin Barres sold approximately seven kilograms of cocaine hydrochloride to Detective John Bruno, an undercover agent who was working with Federal authorities. Barres was immediately arrested, and he soon implicated petitioners Pomares and Veciana as being his previously undisclosed partners in the drug sale. Based upon Barres' allegations, Federal arrest warrants were issued in the Southern District of New York. Veciana was arrested in Miami on July 24, 1973, and Pomares was arrested at his home in Puerto Rico on July 29, 1973 (3a).

One of the six agents who were at Pomares' home to accomplish the arrest was Detective Bruno; another was Octavio Pinol, an agent of the Federal Drug Enforcement Administration (FDEA). Pomares had no prior criminal history (A. 534). Upon arresting him, in the presence of his wife and young children, the agents sought and received permission to conduct a thorough search of his home, but found nothing of evidentiary value (A. 305-6, 327-31).

During the course of the search, Pomares was advised of his rights as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). However, the agents went further and told him that the exercise of his rights to remain silent and to have the assistance of counsel would work to his clear detriment since they already had all the evidence they needed to convict him.

Agent Pinol acted as a Spanish interpreter for Detective Bruno. He testified that, at Bruno's request, he told Pomares that he could receive a sentence of fifteen years imprisonment, and that ". . . you are in very deep trouble. The best lawyer is your own self, you cooperate with the Government" (A. 511-12).

Agent Bruno testified that he told Pomares, ". . . that anything he does to help us will in fact be helping him, because we already know the whole story and that we had him tight", and also told him, ". . . Pal, we got you good. You are going away for a ton of years" (A. 570-1, 576).

The testimony of both agents, concerning these counter-warnings, is set forth in greater detail in the margin.*

---

* *Agent Pinol testified as follows*:

"Q. During the course of that day prior to his arraignment, did you hear anyone advising Mr. Pomares as to the possible results of his . . . prosecution and conviction in this case? * * * Did you tell him how much time he could go to jail for? A. Yes, sir.

"Q. What did you say? A. He didn't say anything.

"Q. What did you say?

* * * * *

"A. Well, it was possible he can be sentenced to 15 years.

"Q. Just 15? A. Yes, sir.

"Q. And did anyone tell him that it would be advantageous to him to cooperate?

* * * * *

"A. Oh, yes, sir.

"Q. Who told him that? A. Mr. Bruno, and I translated to him in Spanish.

"Q. Can you tell me what was said? A. Mr. Bruno told him in English that the best lawyer he can ever have was his own person if he cooperated with the Government.

"Q. The best lawyer he could ever have was his own self? A. Yes.

"Q. And cooperate with the Government? A. That's correct" (A. 511-512).

Agent Pinol further testified:

"I recall Mr. Bruno told him that, 'you are in very deep trouble. The best lawyer is your own self, you cooperate with the Government'" (A. 602).

* * * * *

"Q. While you may not recall specific words, do you recall as to whether such things were said? A. I mentioned to you what Mr. Bruno told him, 'the best lawyer is yourself.'

"The Court: That was in the car?

"The Witness: Mentioned again in the car.

"Q. Did he also say that in the house? A. Yes, sir.

"Q. He said it twice? A. Yes.

"Q. Then you arrived at some Government agency, is that correct? A. San Juan District Office of the Drug Enforcement Administration, Old San Juan.

"Q. While you were there did Bruno again make such statements to Mr. Pomares? A. What statements?

"Q. Statements such as, and I will give you by way of example, 'we have a lot of evidence against you, you better cooperate, you don't need a lawyer, your best lawyer is yourself,' words to that effect. A. I believe so, he repeated that at the office, yes, sir." (A. 604-605).

Agent Bruno testified:

"* * * I says,—through Pinol I explained to him [Pomares] that anything he does to help us will in fact be helping him, because we already know the whole story and that we had him and we had him tight.

"Q. What happened after that? A. We removed him back to the DEA offices in San Juan, where I began to interview Mr. Pomares through Agent Pinol, who was acting as interpreter" (A. 570-571).

* * * * *

"Q. I recall that in describing your initial interview with Mr. Pomares you said—may I have a moment to check my notes?

"The Court: Yes.

"Q. You told him that he was dead and in his own interest he had better come clean. Is that what you told him? A. Yes.

"Q. Did you say the same thing to Pomares upon encountering him? A. Yes, sir. I informed him that we had certain evidence against him that we believed was damaging and which when he was brought to trial would convict him.

"Q. Is that how you said it? A. Not exactly.

"Q. What did you say? A. I said, 'pal, we got you and got you good. You are going away for a ton of years.'

"Q. I see. Thereafter, you brought him to a Federal agency there in Puerto Rico. Is that correct? A. Yes, sir.

"Q. And you interviewed him? A. Yes, sir" (A. 576).

Following the search of Pomares' home, he was transported to the FDEA office in San Juan by agents Bruno and Pinol. Both during the drive and at the headquarters, Bruno again repeated, through Pinol, the warnings and the counter-warnings. He was thus told three times that he should cooperate and that it was not in his best interests to get a lawyer, and that the evidence against him was conclusive (A. 604-5); testimony of Agent Pinol, quoted, *supra,* fn. at pp. 5-6.

Pomares thereupon agreed to give a statement. As made clear by the testimony of Agent Pinol, Bruno's subsequent interrogation of Pomares was in the form of leading questions, apparently based upon the allegations which had previously been made by Barres (A. 606-7). He confessed that, acting pursuant to the instructions of Barres, he had received the seven kilograms of cocaine from Veciana in Miami and had delivered the drug to Barres in New York on July 23, 1973.

The interview of Pomares at the FDEA took place between 1:20 P.M. and 4:00 P.M., and was terminated by a direction from the local United States Attorney that Pomares be brought before a magistrate for arraignment (A. 507-9). During the course of the interview, the agents did not, at first, take notes. Thereafter, notes were taken by Agent Pinol. A few days later, Pinol put the "rough notes" into the form of a typewritten report. Neither the notes, nor the report, was ever signed by Pomares (Def. Ex. A, A. 800-3; A. 507, 514-5).

A. The First Indictment.

On August 10, 1973, Barres, Pomares and Veciana were indicted in the Southern District of New York. The indictment was in two counts. The first count charged that the three men conspired to possess and distribute cocaine (21 U.S.C. § 846). Although the conspiracy was alleged

to have commenced on November 1, 1972, the only overt acts mentioned were those which had occurred in July, 1973, in connection with the sale to Detective Bruno (A. 5-6). The second count charged Pomares with the actual possession of the cocaine which had been sold to Bruno on July 23, 1973 (A. 7).

B. The Superseding Indictment.

On January 4, 1974, four days before the trial commenced, the government filed a superseding indictment which added two additional overt acts to the conspiracy count, both of which were alleged to have occurred at the time of the sale to Detective Bruno. In addition, Veciana was named as a defendant in the substantive count. (A. 8-12).

C. The Scope of the Government's Trial Proof.

During the Government's opening to the jury, the defense and the Court were advised for the first time that the Government's case would include allegations that the defendants had engaged in substantial narcotics transactions prior to those mentioned in the indictment. This expansion of the charges of the indictment was particularly offensive in that the superseding indictment had been filed just a few days before the trial commenced.

At the conclusion of the Government's opening to the jury, the defense unsuccessfully moved for a mistrial upon this ground (A. 143-145), and that motion was renewed throughout the trial (A. 191, 618). Failing to have the evidence excluded, the defense unsuccessfully moved to have it stricken (A. 648-650).

As a result of the Court's rulings, a substantial part of the testimony of the witness Barres concerned two narcotics transactions not included in the indictment, one of which occurred prior to the time period covered by the

indictment: the first transaction—April, 1972 through August or early September, 1972 (A. 166-200); the second transaction—August, 1972 through April, 1973 (A. 200-232). The indictment, itself, only charged the third transaction which occurred during the period from April, 1973 through July, 1973 (A. 233-295, 348-353).

In an effort to justify its position to the jury, the Government improperly sought to "explain" the omission of those charges from the indictment upon the theory that the charges could not be made since the narcotics which formed the subject matter of those transactions were not in the possession of the Government (A. 706) *—indeed, a novel theory which, if true, would invalidate numerous indictments.

D. The Prosecutor's Efforts to Use the Silence Of The Petitioners Against Them.

1. Pomares' Failure to Cooperate

The prosecutor's direct examination of Agent Pinol before the jury proceeded as follows after Pinol's recitation of Pomares' alleged admissions:

> "Q. Now, after this had been done, was Mr. Pomares arraigned before the Judge in Puerto Rico? A. Yes, sir.
>
> "Q. And did you make arrangements to see him again at that point? A. Yes, sir. Mr. Pomares promised to come back to the office as soon as he made bail and make a statement, sign the statement, but he never did. The same Sunday when he was taken before the Chief Judge for arraignment, and the Judge set bail for $100,000.

* The prosecutor argued: "It's a smokescreen. It's like you puff up smoke to distract from what's going on. For instance, [counsel for Pomares] says that the first two transactions are described are not spelled out in the indictment. Well, of course they are not spelled out in the indictment. We don't have the cocaine" (A. 706).

"Q. But then he didn't come back the next day? A. Well, he was in jail the next day.

"Q. Did he come back when he got out of jail? A. No, sir.

"Q. Did you try to contact him to see if he still wanted to cooperate? A. I talked to his lawyer and I talked to him and he promised to come back but he wanted immunity.

"[Counsel for Pomares]: May we have a Bench conference at this point, your Honor?

"The Court: Yes.

(At the side Bar)

"[Counsel for Pomares]: I am thoroughly taken by surprise by what has just occurred. This is obviously a comment upon my client's exercise of his right to remain silent and it's thoroughly improper. It's a violation of his Fifth Amendment right. I had no indication about it.

"[Prosecutor]: This is the end. We just wanted to show that he didn't come back.

"[Counsel for Pomares]: I had no indication of this.

"The Court: Don't go any further than this" (A. 592-593).

Thereafter, when the jury was excused, counsel for the petitioner Pomares moved for a mistrial upon the ground that "the witness, Pinol, had, I think, indicated to the jury that my client exercised his Fifth Amendment right. I believe that in and of itself is a violation of his rights and is likely to prejudice the jury against him" (A. 618-619).

2. Veciana's Failure to Cooperate

The prosecutor argued in summation:

> "* * * * . . . the Government did get the cocaine. So that has been protected from going out in the street. But now who holds the key to the funnel of cocaine up from Bolivia through this route? Who holds that key but Mr. Veciana? Let's remember that. Let's remember the different roles each of them played in this transaction. Veciana, the man who had the contacts in Bolivia; Pomares and Barres, the men who were going to sell it here. Remember, neither was going to talk about the people they dealt with. Each of them was going to have their separate functions. So no one knows but Veciana. Only he knows who the sources are in Bolivia. So although we have stopped this shipment of cocaine this time, only Veciana could stop —by giving the Government the information, stop the flow of cocaine up from Bolivia" (A. 691).

It is true that, at the immediate request of the defense, the Court instructed the jury to disregard the prosecutor's argument (A. 692). Nevertheless, the prosecutor immediately went on to comment:

> "With respect to Barres, he has cooperated with what he knew" (Tr. 619).

E. The Lopez Incident.

According to Barres, he and the petitioners met at a Miami apartment on July 21, 1973 for the purpose of permitting a transfer of the cocaine from Veciana to Barres and Pomares. Veciana was about to go down to his car to get the cocaine when Barres unexpectedly had two innocent visitors. This prompted petitioners to quickly leave. After the visitors left, Pomares returned with the cocaine,

claiming that Veciana had given it to him in a parking lot (A. 264-9).*

Both of the visitors, Figueroa (A. 462-481) and Lopez (A. 482-489), testified concerning their arrival and concerning the departure of Pomares and Veciana. Later, claiming merely, "I neglected to ask (Lopez) a question" (A. 498), and "I just have one further question from (Lopez)" (A. 499), the prosecutor was permitted to call Lopez back to the stand, "for one question" (A. 499).

The prosecutor then asked Lopez a series of questions which established that, four or five days before trial, Veciana met with the witness Lopez (A. 501). When asked the substance of that conversation at that time, Lopez responded:

> "He asked me to tell the truth. Not to tell anything that was not the truth. I told him that is what I would do, to tell that they were there when I arrived. So I think there must be some misunderstanding because they left soon after I arrived, *first Pomares and then Veciana*" (A. 500) [Emphasis added.]

Further questioning by the prosecutor elicited the fact that there had been a discussion between Lopez and Veciana as to the length of time that Pomares and Veciana remained in the apartment after the visitors arrived, i.e., whether Veciana left "right after Mr. Pomares left" or whether he waited "a few minutes" (A. 501). The witness' conclusion as to the true facts was expressed as follows: "He asked me to say that there was some time between both of them left. *There was some,* but very, very

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* Ana Veciana, the petitioner's seventeen year old daughter, testified as a defense witness. She was waiting for her father in the car on this day and she did not see any package in her father's possession or in the car (A. 629, *et seq.*).

little. It was very fast. * * * I told him that I would say just the truth" (A. 501; emphasis added).

On cross-examination, Lopez again verified that Veciana told him to tell the truth (A. 502).

Nowhere in the trial testimony or the pre-trial statements of Lopez is there any indication that Veciana, in fact, endeavored to persuade Lopez to lie. Nevertheless, the prosecutor argued in summation:

> " * * * . . . now, if there were any confession of guilt, it's going to be a witness and trying to get him to testify that people left separately, when, in fact, they left together. Then, of course, Mr. Veciana said, 'but tell the truth. Tell the truth.' Mr. Veciana is no dummy. He is not going to tell him to lie. If he should get Mr. Lopez to say they left separately, that would put the lie to Barres because Barres said they left together, but they were going off to switch the cocaine. *So you can see Mr. Veciana practically standing up and admitting by going to a witness and trying to get that witness just a few days before trial to testify that they left separately, when in fact, Lopez, Figueroa, and Barres said they left together*" (Tr. 629).

Of course, there was no evidence that Veciana knew what Barres had told the authorities concerning the meeting and the sequence of departure. Similarly, Lopez' testimony was that there was some difference in the departure time of the two men. In any event, the Government argued that Veciana's post-conspiracy statements and activities were inculpatory. Since the event in question involved the interaction of Veciana and Pomares, an alleged admission of guilt by Veciana was necessarily inculpatory of Pomares.

F. The Prosecutor's Enlargement Upon the Facts.

Barres was the Government's indispensible trial witness. The fact that he had been caught in the act, together with several factors concerning his background, severely detracted from his credibility. In summation, therefore, the prosecutor argued to the jury that the story which Barres told at trial was, detail for detail, the same as the story he had told upon his arrest, thus lessening the likelihood of falsehood, particularly since it intermeshed with various other evidence in the case which, on its face was not inculpatory but only became such when painted with the gloss of Barres' testimony.

There was no record support at all for this claim. The content of Barres' post-arrest confession had not been revealed to the jury. Thus, each of the following emphasized portions of the prosecutor's summation constituted argument based upon alleged facts not otherwise before the jury:

> "When I say it boils down to that basic or roundabout picture, the other thing it boils down to is that the only corroboration you have seen in this case has substantiated what Barres *said*. That corroboration was in documents. He didn't know what documents were going to be found by the Government *when he made his statement*. So he was taking a risk if he was making it up. *In fact at each point there could have been a document, there it is.*
>
> "Then we had the people witnesses, the Nunezes, the Figueroas, the Carpios. Each of them corroborated an important detail of Barres' testimony. Wherever there was a person who could be brought into corroborate, in short, he was there corroborating. *Barres didn't know they were going to be available.* Wherever these men's conspiracy ran into someone else, that person was here, if he was an innocent per-

son. We didn't get the diplomat, we didn't get those people yet" (A. 698).

* * * * *

"Now, it also comes down with respect to Barres' testimony, I think really the most telling detail is that Mr. Barres told the Government about the three kilograms in Florida. *He told the Government about the fact that he had been involved in two previous shipments of five kilos and nine and a half or ten kilos.* The Government didn't know anything about that. He, Mr. Barres, got on the stand and he also told the Government, as Mr. Bruno said right after he'd been arrested, he told them about the three kilos in that apartment down in Florida. If you were going to cover up or make up a story, you certainly aren't going to incriminate yourself to the tune of three more kilograms of cocaine. You certainly are not going to turn over the scales. *You are certainly not going to say, 'yes, sure enough, I did five other kilos the year before, and I did ten other kilos six months before.'* That would be absolutely insane" (A. 703).

* * * * *

"It's at that point [i.e., upon his arrest] that Barres just opens up. Barres tells about the three kilos, *tells about Veciana, tells about Pomares, tells about everything that happened. He tells about the other two shipments.* I reiterate, why in the world would he tell about these other three kilos? *Why would he incriminate himself about these other five kilos and the other nine and a half kilos if it weren't the truth right down the line?*" (A. 722) [Emphasis added].

Reasons For Granting the Writ

I.

The Manner In Which Petitioner Pomares Was Questioned Failed to Meet Federal Constitutional Standards.

As shown by the facts set forth *supra*, pp. 4-7, the issue presented is whether it is permissible for arresting agents to secure a waiver of constitutional rights from an accused by repeatedly giving him a series of counter-warnings against the exercise of those rights. In the present case, after advising the petitioner Pomares that they had him "tight" and he would go away for "a ton of years", the agents told him he would do best for himself by cooperating, and also told him that he would be his own best lawyer. We respectfully submit that such repeated counter-warnings violate the clear purpose of the rules laid down by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The burden of establishing a waiver by the accused of his right to remain silent and of his right to counsel is on the prosecution. It is based on the rule that the waiver of a constitutional right will not be lightly inferred. *Johnson* v. *Zerbst*, 304 U.S. 458. This rule applies to in-custody interrogations, as was here the case, and "a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel" *Miranda* v. *Arizona*, 384 U.S. 436 at 475. A valid waiver will not be presumed simply from the fact that a confession was obtained, *Carnley* v. *Cochran*, 369 U.S. 506. Indeed, ". . . the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege" *Miranda* v. *Arizona*, 384 U.S. at 476.

If psychological coercion is used in obtaining a confession, it can render the confession involuntary notwithstanding the fact that the interrogating agent went through the perfunctory ritual of advising the defendant as to his rights, *Gorman* v. *United States*, 380 F.2d 158 (1st Cir., 1967); *Colombe* v. *Connecticut*, 367 U.S. 568.

In *United States ex rel. Williams* v. *Twomey*, 467 F.2d 1248 (6th Cir., 1972), the Court condemned, in the following words, purported warnings which tend to encourage or mislead a defendant to forego his rights:

> "The entire warning is, therefore, at best, misleading and confusing and, at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment" (467 F.2d at 1250).

To be effective, the procedural safeguards imposed by the *Miranda* decision must be fully observed, and rights of suspects must be jealously guarded; not even the slightest circumvention or avoidance should be tolerated, *United States* v. *Crisp*, 435 F.2d 354 (7th Cir., 1970), *cert. denied*, 402 U.S. 947. If legal advice is given an accused at a pretrial interrogation, such advice must be accurate, *United States ex rel. Vanderhorst* v. *LaVallee*, 285 F. Supp. 233, aff'd. 17 F.2d 411, *cert. denied, McMann* v. *Vanderhorst*, 397 U.S. 925.

Any reasonable doubt as to whether a defendant was properly informed of his right to remain silent must be resolved in favor of the defendant, *United States* v. *Mullings*, 364 F.2d 173 (2d Cir., 1966).

At the instant trial, it was made clear that petitioner Pomares, who had no prior criminal history (A. 534), was encouraged, indeed, practically, terrorized, into foregoing his rights. Every "warning" was contradicted by a contrary warning that the exercise of his rights would place

him in deeper trouble than he was already in and would deprive him of the possibility of leniency. Additionally, he was improperly told that it was in his best interests to function as his own lawyer. This precise tactic was clearly condemned in *Miranda* v. *Arizona, supra.* Following a review of various impermissible strategems of psychological coercion, 384 U.S. at 447-457, this Court made clear that psychological intimidation or cajolery will not be tolerated, notwithstanding an otherwise proper recitation to a defendant of his rights:

> " * * * Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver, will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and *not simply a preliminary ritual to existing methods of interrogation*" (384 U.S. at 476; emphasis added].

A case directly in point is presented in *People* v. *Russell,* 66 Cal. Rptr. 594 (C.A. Dist., 1968), wherein it was held that advice such as that given in the instant case was constitutionally inadequate:

> "In our opinion the adequacy of the warning given to appellant by Officer Acuna himself was destroyed by Acuna's supplementing that advice with 'it might be better for you if you talked.' This bit of gratuitous advice nullified and made ineffective his previous admonition to appellant to the contrary. At the very least it qualified and rendered unclear that which, under *Miranda,* must remain unqualified, clear and unequivocal.
>
> "Since the admonitions given to appellant did not meet *Miranda* standards, we do not have to reach the question of whether the evidence is sufficient to support the trial Court's implied finding that appel-

lant's response to Officer Acuna's questions were freely made. However, even if we were to regard Officer Acuna's advice that 'it might be better for you if you talked' as a separate inducement which did not detract from the preceding statement of rights, we would still be of the view that appellant's statement was inadmissible because Officer Acuna acted improperly. The applicable rule under pre-*Miranda* law was stated in *People* v. *Hill,* 66 Cal. 2d 536, 549, 58 Cal. Rptr. 340, 348, 426 P. 2d 908, 916, as follows: 'When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, the prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.' The words 'it might be better for you' when made, as in this case, to a suspect in the isolation of an interrogation room can too easily be interpreted as an implied threat or cajolery not to be equated with a statement whose sole purpose is to point out to the suspect the benefit which 'follows naturally from a truthful and honest course of conduct.'" (66 Cal. Rptr. 599-600).

For the above reasons, the alleged admissions of the Petitioner Pomares should not have been revealed to the jury, and the judgment of conviction should not be permitted to stand.

II.

The Jury should have been charged, as requested by the Defense, that if they found the alleged Pomares statement unreliable, they were entitled to completely disregard it.

The defense submitted to the trial court a written request to charge as follows:

> "Weight to be Given Alleged Admission
>
> "There has been evidence at this trial that, following his arrest, the defendant Pomares admitted to some extent that he participated in the transaction charged by Count II of the indictment. Whether or not he, in fact, made such an admission is a question for you to determine.
>
> "The defense has argued that the circumstances under which Mr. Pomares allegedly made the admission rendered the admission unreliable. The question of its reliability is also one for you to determine. As with all other evidence in the case, if you find that he did, in fact, make such an admission, you should give it such weight as you feel it deserves under all the circumstances. If you find that it is without reliability, you may disregard the alleged admission altogether. (*Lego* v. *Twomey,* 404 U.S. 477, 485-486; 18 U.S.C. § 3501[a])" (A. 799).

At a conference in advance of summations, the trial court advised that the requested charge would be "denied except as charged" (A. 656).

In its charge to the jury, the Court referred to the issue only in the following way:

> "In considering these statements, ladies and gentlemen, give them such weight as you think they deserve under all the circumstances which have been brought out in the evidence in the case" (A. 748)

At the conclusion of the charge, defense counsel took exception as follows:

> "[Counsel for defendant Pomares]: I request the Court charge that the jury may completely disregard the confession or the alleged admission of my client.
>
> "The Court: No, I wouldn't charge that" (A. 754-755).

In *Lego* v. *Twomey*, 404 U.S. 477, at 485-486 (1972), Mr. Justice White, speaking for the majority, held:

> "* * * The procedure we established in *Jackson* [v. *Denno*, 378 U.S. 368] was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. *In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief*" [Emphasis added].

We respectfully submit that the trial court's passing reference to the fact that the jury might give such "weight" to the confession as it deserved under the circumstances, did not sufficiently apprise the jury of its right to completely disregard the alleged confession if it deemed it to be unreliable. If a jury has such a right, as *Lego* makes clear it does, then it should be told of that right in no uncertain terms. Assuming, *arguendo*, that the charge as

given might, to lawyers, have essentially the same meaning as the charge as requested, it must be realized that the jurors were not lawyers and cannot be expected to completely disregard such evidence unless they are clearly told it is within their province to do so.

Since the Court refused to give the requested charge, the judgment of conviction, as against Pomares, should be reversed. Similarly, the petitioner Veciana was prejudiced by the failure to give the requested instructions since it is unlikely that the jury viewed the evidence against him without taking into account the corroborative effect which Pomares' confession had upon the credibility of Barres.

III.

The Prosecution Wrongfully Adduced Evidence and Commented Upon the Failure of the Petitioners to Waive Their Fifth Amendment Rights to Remain Silent.

As set forth *supra,* p. 10, the prosecutor intentionally elicited from one of the interrogating agents the fact that the petitioner Promares refused to continue to cooperate with them, and the fact that Pomares' attorney later inquired as to the possibility of a grant of immunity.

Similarly, as noted *supra,* p. 11, the prosecutor, in summation, advised the jury that the failure of the petitioner Veciana to cooperate with the government would swell the pipeline of illicit drugs into the United States.

As early as its decision in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Court made crystal clear that, having answered some questions, an accused has an absolute right to invoke his privilege at any time during in-custody interrogation, and the fact of such exercise of the right may not be revealed to the jury:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.* Cf. Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964); Comment, 31 U.Chi. L. Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1041-1044 (1966). See also Bram v. United States, 168 U.S. 532, 562 (1897)." (384 U.S. at 468, fn. 37).

Indeed, *Miranda,* stated the point twice:

"* * * Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated" (384 U.S. at 475-476).

For all of the above reasons, it is respectfully submitted that the revelation to the jury that the petitioner had invoked his privilege, was, itself, a violation of the privilege. Pinol's testimony violated petitioner's Fifth Amendment right. That violation was compounded by the fact that Pinol was led by the prosecutor into giving such testimony. *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

The prosecutor's comments with regard to petitioner Veciana not only constituted a comment upon his failure to cooperate with the Government, but also raised the spectre of large quantities of narcotics coming into the United States because of his lack of cooperation. One cannot imagine a more grievous violation of the Fifth Amendment privilege against self-incrimination, particularly since it blatantly appealed to the fears and prejudices of the jury. *Viereck* v. *United States,* 318 U.S. 247 (1943); *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

IV.

Each of the Petitioners was entitled to a Separate Trial.

Neither of the petitioners testified at the instant trial.

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court held that admissions of a defendant tending to incriminate a co-defendant, but not made in furtherance of the criminal enterprise, may not be used at a joint trial because the admission of such evidence would likely deprive the co-defendant of his constitutional right to confrontation and cross-examination. *Bruton* analysed the problem as follows:

> "[A]s was recognized in *Jackson* v. *Denno, supra*, there are some contexts in which the risks that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. * * * Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant who stands accused side by side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the confrontation clause was directed.* * *
>
> "We, of course, acknowledge the impossibility of determining whether in fact the jury did or

did not ignore Evan's statement inculpating petitioner in determining petitioner's guilt. But that was also true in the analagous situation in *Jackson* v. *Denno,* and was not regarded as militating against striking down the New York procedure there involved. It was enough that that procedure posed 'substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore.' 378 U.S. at 389. Here, the introduction of Evan's confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evan's inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. * * *" (391 U.S. at 135-7).

We respectfully submit that the principle of *Bruton* was violated with respect to both petitioners.

A. The Use of the Alleged Confession of Pomares Violated the Rights of Petitioner Veciana

As noted by the Court of Appeals, in advance of trial the prosecutor assured the court and defense counsel that the Pomares confession would not be used in evidence at the trial. The assurance was given in response to the contention of counsel for Veciana that the use of the statement would be violative of Veciana's rights under *Bruton* v. *United States, supra* (4a; A. 19). When the government sought to rescind its prior stipulation on the first day of

trial, government counsel declared his willingness to try both petitioners separately (A. 107, 112-113, 116). Indeed, at one point, the government, itself, moved that the petitioners be granted separate trials (A. 126-7). When the trial court held that the government was precluded, by virtue of its prior stipulation, from using the Pomares confession at all, the problem ceased to exist. However, when the court reversed itself, in the midst of trial, counsel for Veciana immediately took exception based upon the rule of *Bruton* v. *United States, supra* (A. 298-300).

While it is true that *Bruton* concerned itself with the direct inculpation of a defendant by the confession of another defendant, the true problem against which *Bruton* sought to safeguard was nonetheless present in the instant case. In providing the jury with the details of Pomares' confession, even though references to Veciana were redacted from it, the government was able to provide clear cut corroboration for the otherwise uncorroborated testimony of Barres.

Although this issue was raised in the Court of Appeals, the Court does not deal with it in its opinion. Petitioner Veciana respectfully submits that where a confession of a co-defendant provides strong corroborative proof tending to enhance the credibility of a government witness who, himself, is an accomplice, the jury cannot be expected to disregard that proof in determining the weight to be given to the witness' testimony as regards all defendants on trial.

B. Petitioner Pomares' Rights were Violated by the Government's Proof and Argument with Regard to Petitioner Veciana's Alleged Efforts to Tamper With the Testimony of a Government Witness

As fully set forth *supra,* at pp. 11-13, the prosecutor elicited from the witness Lopez the fact that petitioner Veciana came to see him following the indictment herein and prior to trial. It will be recalled that, according to the chief prosecution witness, Barres, Lopez and a friend innocently interrupted a meeting at which Veciana was supposed to transfer cocaine to Barres and Pomares. As a result, he claimed, Pomares and Veciana quickly left the meeting together and accomplished the transfer between themselves elsewhere.

The prosecutor elicited from Lopez the fact that during his post-indictment meeting with Veciana, Veciana sought to persuade him that Veciana and Pomares had left Barres' apartment separately and that several minutes elapsed between their respective departures.

The prosecutor argued in summation that Veciana's efforts at persuasion constituted an admission of his criminal conduct:

> "* * * So you can see Mr. Veciana practically standing up and admitting by going to a witness and trying to get that witness just a few days before trial to testify that they left separately, when in fact, Lopez, Figueroa, and Barres said they left together" (*supra,* p. 13).

Since the event in question, i.e., the original meeting at Barres' apartment, involved the interaction of Veciana and Pomares, an alleged admission of guilt by Veciana was necessarily inculpatory of Pomares. The prosecutor's argument was, therefore, a clear violation of Pomares' rights

under *Bruton* v. *United States, supra.* Defense counsel's efforts to have the problem remedied or corrected prior to the submission of the case to the jury were denied (A. 726-7, 755).

* * * * *

With respect to both petitioners, if the prosecution desired to legitimately utilize the alleged incriminatory statements and conduct of each, then separate trials, as requested, were easily possible. The failure to grant separate trials truly deprived the respective petitioners of their right to confrontation and cross-examination and, for that reason, their convictions should be reversed.

V.

Both Petitioners were Deprived of their Rights to Confrontation and Cross-examination by the Prosecutor's repeated references in Summation, to alleged Facts Not in Evidence, for the Purpose of Corroborating the Testimony of the Government's Accomplice Witness.

We have set forth *supra* at pp. 14-15, the facts which show that throughout his summation the prosecutor argued to the jury that the testimony of the witness Barres was made credible by virtue of the fact that it conformed in every respect to the confession which Barres had made upon his own arrest at a time when he could not have prepared a false story and could not have anticipated other aspects of the government's proof. In fact, there was no evidence as to the contents of Barres' confession. By arguing the alleged contents of that confession to the jury, the prosecutor, in effect, became an unsworn witness against the petitioners in clear violation of their right to be confronted by and to cross-examine the witnesses against them. A motion for a mistrial upon the ground that the prosecutor had resorted to facts outside the record was denied by the trial court (A. 725-6).

In *Turner* v. *Louisiana*, 379 U.S. 466, 472-3 (1965), this Court held that "the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Where alleged facts are conveyed to the jury without the protections of confrontation and cross-examination, particularly when those facts tend to enhance the government's claims as to the evidence legitimately in the case, then the conviction must be reversed, *Turner* v. *Louisiana, supra; Parker* v. *Gladden*, 385 U.S. 363 (1966); *Sheppard* v. *Maxwell*, 384 U.S. 333, 351 (1966); *Kirby* v. *United States*, 174 U.S. 47, 55, 56 (1899); *In Re Oliver*, 333 U.S. 257, 273 (1948); *Pointer* v. *Texas*, 380 U.S. 400 (1965).

VI.

The Government was Improperly Permitted to Expand the Scope of the Indictment to cover crimes not Charged and not otherwise Revealed to the Defense in Advance of Trial.

As noted *supra*, pp. 7-8, the initial indictment in this case charged a conspiracy extending from November 1, 1972 until August 10, 1973 (the date of the indictment). The overt acts alleged in the conspiracy count, as well as the specific charges of the substantive count, related only to an alleged sale of cocaine in late July, 1973. The superseding indictment, which was filed only four days before trial, merely included the petitioner Veciana in the substantive count (*supra*, p. 8). However, at trial, the government was permitted, over objection, to prove two additional narcotics transactions. One of these occurred in its entirety months prior to the alleged comencement of the conspiracy; the second occurred toward the commencement of the alleged conspiracy. The defense was given no prior notice, whatsoever that the government claimed and in-

tended to prove the two prior transactions. Nevertheless, an overwhelming portion of the testimony of the government witness Barres was devoted to his allegations concerning those transactions.

As early as 1807, Chief Justice Marshall stated:

> "It is, I believe, a general rule in criminal prosecutions that a distinct crime for which a prosecution may be instituted cannot be given in evidence in order to render it more probable that the particular crime charged in the indictment was committed." *United States* v. *Burr,* F. Cas. No. 14694 (1807, CCVa).

Evidence as to other crimes should be rejected as irrelevant, unless its admission serves some substantial legitimate purpose, *Drew* v. *United States,* 331 F.2d 85 (D.C. Cir. 1964); *United States* v. *Spatuzza,* 331 F.2d 214 (7th Cir. 1964).

It is generally recognized that, when relevant to establishing proof of the defendant's motive, intent, or plan, evidence of other crimes may be admitted if its probative value outweighs its prejudicial character, Proposed Rules Of Evidence for the United States District Courts and Magistrates, Rule 4-04(b). *United States* v. *Byrd,* 352 F.2d 570, 574 (2nd Cir. 1965); *Boyer* v. *United States,* 132 F.2d 12, 13 (D.C. Cir., 1931); *McCormack, Evidence,* § 157, at p. 332 (1954).

In the present case, however, the testimony of the prosecution witness, Barres, left no room for the issues of intent, knowledge or anything similar. His testimony as to the prior transactions did not enhance the government's case in any legitimate way. There was no issue as to knowledge or intent—according to Barres, the participants discussed the plot for the third transaction, i.e.,

the transaction charged in the indictment, in detail and everyone knew precisely what they were doing.

The practical prejudice to the petitioners which resulted from the addition of the prior two transactions to the charges of the indictment was that the defense was completely unprepared to meet Barres' claims. If more than lip service is to be given to the presumption of innocence, it must be assumed that the petitioners knew nothing of the alleged prior transactions. See, for example, the reasoning of Judge (later Justice) Whittaker in *United States* v. *Smith,* 16 F.R.D. 372 (W.D. Mo., 1954), where, ruling on discovery motions, he stated that the presumption of innocence obliged courts to assume that a defendant is unaware of the details of the crimes charged against him.

To announce for the first time during its opening that it intended to prove that the conspiracy was far greater than that charged in the indictment and had commenced prior to the time specified in the indictment, was nothing less than a deprivation to the defense of an opportunity of defending against the charge. It was a trial by ambush. The record contains no justification for the government's failure to give the petitioners any notice, through the indictment or otherwise, of its intention to introduce such proof.

The vice of the government's tactics is not only that it caught the defense unawares, but also that it further emphasized the petitioners' failure to introduce any rebuttal evidence as to those transactions. While it is true that the jury was charged that the defense had no obligation to produce any evidence, the government's introduction of these additional crimes certainly fed upon the jury's natural tendencies to take the lack of contradiction into account in reaching their verdict.

The expansion of the indictment by the government requires that the judgments of conviction be reversed.

CONCLUSION

For all of the above reasons, this joint petition for a writ of certiorari ought be granted, and the judgments of conviction ought be ordered reversed.

Respectfully submitted,

HENRY J. BOITEL,
Attorney for Petitioners

July, 1974

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1127—September Term, 1973.

(Argued June 14, 1974 Decided July 5, 1974.)

Docket No. 74-1219

UNITED STATES OF AMERICA,

Appellee,

v.

ARIEL POMARES and ANTONIO VECIANA,

Defendants-Appellants.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* for conspiracy to distribute narcotics and possess them with intent to distribute, and with the distribution of approximately seven kilograms of cocaine. 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846.

Affirmed.

APPENDIX
Opinion of the Court of Appeals

BANCROFT LITTLEFIELD, JR., Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, and S. Andrew Schaffer, Assistant United States Attorney, on the brief), *for Appellee.*

HENRY J. BOITEL, ESQ., New York, New York (Barry L. Garber, Esq., and Abraham H. Brodsky, Esq., New York, New York, on the brief), *for Appellants.*

LUMBARD, *Circuit Judge*:

After a five-day trial in the Southern District before Judge Bonsal and a jury, Ariel Pomares and Antonio Veciana were convicted on January 14, 1974 on both counts of an indictment which charged them with conspiracy to distribute narcotics and possess them with intent to distribute, and with the distribution of approximately seven kilograms of cocaine. 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846. Pomares was sentenced to concurrent terms of five years on each count, to be followed by a special parole term of three years. Veciana received concurrent terms of imprisonment of seven years on each count, also to be followed by a special parole term of three years.

On appeal, the defendants make several points, the two principal ones being that Pomares' confession to government agents was involuntary and that the government waived its right prior to trial to introduce into evidence portions of Pomares' confession. We affirm.

APPENDIX
Opinion of the Court of Appeals

The evidence at trial established that the two defendants, along with a co-conspirator who pleaded guilty, Augustin Barres, organized a cocaine smuggling ring which succeeded in smuggling twenty-five kilograms of pure cocaine into the United States from Bolivia before Barres was finally arrested while delivering seven kilograms to an undercover agent on July 23, 1973. Barres' role in the conspiracy was to help finance the purchase of the cocaine. Veciana was responsible for travelling to Bolivia, purchasing the drugs and delivering them to Bolivian diplomats who then smuggled them into the United States, while Pomares had the task of arranging sales in the United States. All three were experienced businessmen who had fled to Florida from Cuba after Castro had come to power.

After Barres' arrest, he agreed to cooperate with the government. On the basis of information which he provided, Veciana was arrested in Miami on July 24, 1973 and Pomares was arrested at his home in Puerto Rico on July 29, 1973.

Upon his arrest, Pomares was advised of his rights in Spanish by Special Agents Pinol and Amador. He was then taken to the Drug Enforcement Administration office in San Juan where, prior to questioning, he was again advised of his rights by Agent Pinol. After being advised of his rights on each of these occasions, Pomares was told that he faced heavy penalties for his smuggling activities, that he was his own best lawyer, and that the wisest course of action would be to cooperate with the government rather than exercise his right to remain silent. Pomares agreed to cooperate, and confessed twice. On the second of these occasions, Agent Pinol took handwritten notes, of what was being said. These notes were eventually put into the

form of a typewritten report and introduced as an exhibit in the suppression hearing held by Judge Bonsal to determine the admissibilty of Pomares' confession at trial. Judge Bonsal ruled that Pomares' confession was admissible.

On October 4, 1973, during a pretrial conference, the attorney for Veciana raised the issue of "a potential severance problem under *Bruton* since one of the defendants [Pomares] did give a statement and the other one [Veciana] did not." Assistant United States Attorney Bannigan responded: "I can resolve that right now. We will not use the statement."

At trial, the government took the position that it had only waived use of the written statement in order to avoid the *Bruton* problem, but that it had recently learned that Pomares had made an earlier confession, and that Special Agent Pinol was prepared to testify as to this earlier oral confession. Defense counsel objected that the government had waived its right to introduce any confession and in any event both confessions were essentially one and the same, having been obtained within no more than three hours of each other on the same day. Judge Bonsal concluded that the waiver did not reach to the earlier oral confession. In order to avoid any *Bruton* problem, however, the court ruled that only those portions of Pomares' confession could be introduced which dealt with events after Veciana had delivered the last shipment of cocaine. Thus so much of the statement as was admitted in evidence made no mention of Veciana or any transactions in which he participated.

I.

On appeal, Pomares and Veciana maintain that Pomares' confession was involuntarily obtained and therefore should

not have been admitted in evidence. They argue that the comments of the special agents who arrested Pomares that he faced severe penalties, that he was his own best lawyer, and that full cooperation with the government would be the best course were improper and coerced the defendant into confessing.

We emphasized in *United States* v. *Ferrara*, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967), that

> "the test of voluntariness [of a confession] is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined. . . ." *See also* Rogers 1. Richmond, 365 U.S. 534, 544 (1961).

The circumstances here do not disclose any overbearing on the part of government agents. There is no dispute that after his arrest and prior to making his oral confession, Pomares was advised three times in his native language, Spanish, of his constitutional rights and in response indicated that he understood them. The *Miranda* warning was given twice at his house after his arrest, once by Agent Amador and once by Agent Pinol, and the third time at the Drug Enforcement Administration office by Agent Pinol.

Nor is there any evidence that Pomares was subject to any threats, physical coercion, or protracted interrogation. Indeed, his arrest and arraignment occurring on a Sunday, were carried out in an expeditious fashion. He was arrested at approximately 12:15 p.m., brought to the Drug Enforcement Administration office by 1:30 and arraigned before the Chief Judge for the District of Puerto Rico at the Chief

Judge's home between 4:00 and 5:00 p.m. the same day. *See United States* v. *Drummond*, 354 F.2d 132, 144 (2d Cir. en banc 1965), *cert. denied*, 384 U.S. 1013 (1966).

No specific promises were made to Pomares. He was simply informed that it would be to his benefit to cooperate. Such statements by law enforcement officials have not been considered overbearing. *See, e.g., United States* v. *Williams*, 479 F.2d 1138 (4th Cir.), *cert. denied*, 414 U.S. 1025 (1973); *United States* v. *Glasgow*, 451 F.2d 557 (9th Cir. 1971). In *United States* v. *Ferrara, supra*, 377 F.2d 16, we held that the confession was voluntary even though federal agents had gone beyond simply urging the defendant to cooperate and had promised that he would be released on bail if he confessed. *See also United States* v. *Bailey*, 468 F.2d 652, 672-74 (4th Cir. 1972), *aff'd en banc on other grounds*, 480 F.2d 518 (1973).

Finally, it cannot be overlooked that Pomares is an intelligent, experienced businessman, aged 37 years, who was fully aware of his situation, having been informed by the agents that he had been arrested for violating the "Federal Narcotics Law." Indeed, the record reveals that he was already aware at the time of his arrest that his coconspirator, Barres, had been arrested. In light of all the circumstances, Judge Bonsal was correct in ruling that Pomares' confession was voluntary.

Surely, it is the duty of law enforcement officers to assemble all available evidence relating to the commission of a crime and this includes such information as a participant may be willing to give. Having fairly and fully advised Pomares of his constitutional rights, as required by *Miranda*, the agents were free to discuss with Pomares the reasons why he should cooperate. It was quite proper in

the course of such discussion to mention the situation which Pomares faced and the advantages to him if he assisted the government. The agents stated facts; they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or overreaching. There was every reason for the agents to act as they did; their conduct did not violate the letter or the spirit of the holding of the Supreme Court in *Miranda*.

The appellants' argument that the government waived its right to use Pomares' confession in evidence is also without merit. Judge Bonsal, who was present at the pretrial conference at which the waiver was made, concluded that the waiver was not intended to go so far as to include the prior oral confession. In any event, it was within the discretion of the trial judge to admit testimony as to this earlier oral confession, and under the circumstances it was not an abuse of discretion to do so.

Moreover, it is difficult to see how the government could have waived its right to introduce this prior oral confession, since it only learned about it at trial when Agent Pinol arrived from Puerto Rico and informed the prosecutor that there had been an earlier confession.

Nor could the defendants have been surprised by the use of the confession at trial since they were already fully aware of the substance of the admissions made by Pomares, which he had never denied. In fact, the defendants had ample opportunity to challenge the admissibility of Pomares' confession at a suppression hearing conducted during the trial and did so. At the conclusion of that hearing Judge Bonsal held that Pomares' confession was admissible.

Under the circumstances which disclose no bad faith on the part of the government or surprise to the defendants,

there is no reason to conclude that Judge Bonsal abused his discretion in admitting testimony regarding Pomares' oral confession. *See United States* v. *Cirillo*, slip op. 3297, 3312-3315 (2d Cir. May 7, 1974). It is particularly noteworthy that Judge Bonsal took great care to comply with the *Bruton* rule by having excluded those portions of Pomares' confession dealing with Veciana.

The several other arguments urged by Pomares and Veciana on appeal are also without merit.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-23

ARIEL POMARES AND ANTONIO VECIANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that (1) the manner in which petitioner Pomares was questioned following his arrest made his confession involuntary; (2) the trial court erred in rejecting their proposed instruction concerning Pomares' confession; (3) the trial court should have granted a mistrial after a government witness testified concerning Pomares' decision to stop cooperating with the government; (4) petitioner Veciana was prejudiced by the government's comment about his failure to cooperate; (5) the principles of *Bruton* v. *United States* were violated by their joint trial; (6) petitioners were deprived of their right of cross-examination and confrontation by the government's references in its summation to facts not in evidence; and (7) the government was improperly allowed to expand the scope of the indictment by proving crimes not charged.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of one count of conspiring to distribute cocaine

and to possess it with intent to distribute, and of one count of possessing seven kilograms of cocaine, with intent to distribute, in violation of 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A), and 846. Petitioner Veciana was sentenced to two concurrent seven-year terms of imprisonment, to be followed by a three-year special parole term. Petitioner Pomares was sentenced to two concurrent five-year terms of imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App.).

Petitioners and one Augustin Barres organized a cocaine smuggling ring beginning in late 1971 that ultimately was responsible for smuggling 25 kilograms of cocaine into the United States. In August 1972, through arrangements petitioner Veciana had made with a Bolivian diplomat, five kilograms of cocaine were smuggled into this country. Barres and Veciana each put up $10,000 to finance the venture, and petitioner Pomares weighed and packaged the cocaine once it arrived in Miami and then delivered it in stages to various buyers. The sale resulted in a profit of $40,000 (Tr. 74-90, 94-110).[1]

In April 1973, petitioners and Barres smuggled ten kilograms of cocaine into the coungry using the same diplomat, who hid the cocaine in his furniture. The cocaine was not as easily sold this time, but eventually Pomares' buyer was able to dispose of more than eight kilograms of it (Tr. 112-142). They used the profit from this sale to finance a third effort to smuggle cocaine.

Because there had been difficulty disposing of the second shipment of cocaine, petitioners and Barres looked for a new buyer for the third shipment. Thereafter, Barres

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[1] "Tr." refers to the transcript of the trial.

went to New York and arranged a sale of seven kilograms of cocaine to a man he knew only to be a cousin of a previous associate. In fact, the cousin was an undercover New York City Police detective, John Bruno. On July 23, 1973, when he met with Bruno to consummate the sale, Barres was arrested and seven kilograms of heroin were seized from him (Tr. 143-206).

After his arrest, Barres agreed to cooperate with the police and made a complete statement about the entire operation (Tr. 212). Thereafter, based on information supplied by Barres, federal agents obtained a search warrant for the apartment in Miami that petitioners had used for packaging and storing the cocaine. During the search, they seized three kilograms of cocaine and a weighing scale (Tr. 213).

On July 24, 1973, federal agents arrested petitioner Veciana in Miami. Five days later they arrested petitioner Pomares at his home in Puerto Rico (Tr. 214). Following Pomares' arrest, he was advised in Spanish of his rights, and he consented to a search of his residence. The agents then drove him to the Drug Enforcement Administration office in San Juan where they again informed him of his rights (Tr. 217). They told Pomares that he faced severe penalties for his involvement and that the wisest thing for him to do would be to cooperate with the government rather than exercise his right to remain silent (Tr. 421, 485). Pomares, "an intelligent, experienced businessman, aged 37 years, who was fully aware of his situation," including the fact that Barres had been arrested (Pet. App. 6a), agreed to cooperate and confessed twice. A Drug Enforcement Administration agent took notes during one of these confessions (Tr. 215-225, 227-235, 498-500).

1. Petitioners' contention that the manner in which petitioner Pomares was questioned made his confession involuntary was thoroughly considered and properly

rejected by the court of appeals, upon whose opinion we rely (Pet. App. 5a-7a). The court stated that the test of voluntariness focuses on whether the conduct of law enforcement officials was such as to overbear the defendant's will to resist and bring about a confession not freely self-determined. Applying that standard, the court concluded that the evidence disclosed no overbearing by the government here. Instead, as the court said, the evidence showed clearly that Pomares was given three *Miranda* warnings and was not subjected to any threats, physical coercion, or protracted interrogation. The court specifically rejected the contention that informing Pomares that it would be to his advantage to cooperate constituted overbearing on the government's part (Pet. App. 6a-7a):

> Having fully and fairly advised Pomares of his constitutional rights, as required by *Miranda,* the agents were free to discuss with Pomares the reasons why he should cooperate. It was quite proper in the course of such discussions to mention the situation which Pomares faced and the advantages to him if he assisted the government. The agents stated facts; they made no misrepresentations. Nothing the agents were shown to have said or done was unfair or overreaching.

Other courts have taken similar positions. See *United States* v. *Bailey,* 468 F. 2d 652, 660, 672-674 (C.A. 5); *United States* v. *Springer,* 460 F. 2d 1344, 1346-1348 (C.A. 7), certiorari denied, 409 U.S. 873; *United States* v. *Frazier,* 434 F. 2d 994, 995-996 (C.A. 5); *United States* v. *Ferrara,* 377 F. 2d 16, 17-18 (C.A. 2), certiorari denied, 389 U.S. 908; *Fernandez-Delgado* v. *United States,* 368 F. 2d 34, 35-36 (C.A. 9).

2. Citing *Lego* v. *Twomey*, 404 U.S. 477, petitioners contend that the trial court erred in refusing to instruct the jurors to disregard petitioner Pomares' confession if they found it unreliable. In *Lego*, this Court held that the "preponderance-of-the-evidence" standard is appropriate in determining the voluntariness of a confession and rejected a contention that the "reasonable doubt" standard should be used. The Court stated (404 U.S. at 485-486; footnote omitted):

> The procedure we established in *Jackson* was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession; including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief.

In the instant case, the trial court, in instructing the jury on Pomares' confession, stated: "In considering these statements, ladies and gentlemen, give them such weight as you think they deserve under all the circumstances which have been brought out in the evidence in the case" (Tr. 676). Such an instruction was consistent with this Court's language in *Lego* and adequately conveyed the substance of petitioners' proferred instruction.

3. Also without merit is petitioner Pomares' contention that the trial court erred in refusing to grant a mistrial after the government elicited from a witness the fact that, after an initial confession, Pomares stopped cooperating in the hope of getting immunity (Tr. 501). Agent Pinol of the Drug Enforcement Administration testified about the circumstances surrounding Pomares' arrest, including Pomares' consent to a search of his house and his pre-arraignment confession about his involvement in the cocaine operation. Pinol testified that Pomares agreed that he would sign a written statement following his arraignment, but, after the arraignment, he balked at doing so. When Pinol inquired why, Pomares said he wanted immunity in exchange for any further cooperation. Pomares objected to this disclosure, claiming that it was a comment upon his exercise of his Fifth Amendment right to silence (Tr. 501-502). The trial court instructed the government not to go forward with this line of questioning (Tr. 502). Pomares' request for immunity was not, of course, a simple assertion of his privilege, but rather an effort to bargain over the terms of his cooperation. Accordingly, we believe that disclosure of this action on his part was not an impermissible comment on his assertion of the privilege. In any event, in view of the isolated and brief nature of this testimony and the strong evidence of guilt, any error was harmless beyond a reasonable doubt. See *Schneble* v. *Florida,* 405 U.S. 427, 430.

4. Petitioner Veciana's contention that he was prejudiced by the government's comment upon his failure to cooperate is also without merit. In his summation, the Assistant United States Attorney at one point referred to petitioner Veciana's refusal to cooperate, despite the fact that only he knew who the sources in Bolivia were (Tr. 618). Petitioner objected, and the court instructed the jury to disregard the comment (Tr. 619). Thereafter, there were

no other references to Veciana's refusal to testify. The appropriate procedure in dealing with an improper comment is an objection and an instruction from the court. This procedure was followed in the instant case.

5. Petitioners contend that their joint trial violated the principles of *Bruton* v. *United States,* 391 U.S. 123. At trial, neither Pomares nor Veciana testified, although Pomares' confession was admitted. Prior to its admission, however, all reference to petitioner Veciana and his involvement were excised. The confession as admitted discussed only events that came after Veciana was no longer in the picture. Petitioners' contention that the use of this confession at a joint trial was contrary to *Bruton* is insubstantial.[2]

Petitioner Pomares similarly asserts that he was prejudiced by testimony that showed that petitioner Veciana tried to influence the testimony of a witness. Jose Ramon Lopez, an acquaintance of petitioners, testified that once, when he entered the Miami apartment used by petitioners and Barres, petitioners got up abruptly and left together without speaking to him. Lopez was called later in the trial and testified that Veciana had asked him to testify that petitioners did not leave the apartment at the same time (Tr. 410-411). In his summation, the prosecutor commented that the effort by Veciana to influence a witness's testimony was almost an admission of guilt by him (Tr. 628).

Petitioner Pomares' contention that the admission of this testimony and the comments by the government were necessarily inculpatory as to him is without merit. Neither

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[2]Moreover, prior to trial Veciana had opposed the government's motion for a severance (Tr. 26-27).

Lopez's testimony nor the government's comments referred to any involvement of Pomares. Thus, the testimony did not inculpate Pomares by linking him with the crime charged.[3] *United States* v. *Jackson,* 482 F. 2d 1167, 1174-1175 (C.A. 10), certiorari denied, 414 U.S. 1159; *United States ex rel. Nelson* v. *Follette,* 430 F. 2d 1055, 1057-1059 (C.A. 2), certiorari denied, 401 U.S. 917.

6. Petitioners contend that they were deprived of their rights of cross-examination and confrontation by the Assistant United States Attorney's repeated references in summation (Tr. 616-652) to aspects of Barres' confession never admitted into evidence. However, the references were to Barres' trial testimony and to the testimony of other witnesses, and not to anything not admitted in evidence. At trial, Barres testified about the entire operation, including his involvement and that of Veciana and Pomares. In addition, he testified about his arrest and the information he gave the government after his arrest. Barres' testimony about his cooperation with the government was corroborated by a number of other witnesses.[4]

In any event, the jury was repeatedly told by the court and the prosecutor that what the lawyers say is not evidence and that only the testimony of the witnesses is evidence (Tr. 38, 41-42, 619, 659). Petitioners made no request for a further instruction and do not assert that the instructions given were inefficacious. Cf. *Donnelly* v. *DeChristoforo,* No. 72-1570, decided May 13, 1974.

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[3]Moreover, Lopez was available for cross-examination.

[4]Petitioners give no record reference supporting their contention that the Assistant United States Attorney stated that Barres' testimony was "detail for detail" like his confession (Pet. 14), and we are unable to find any such comment. Although the prosecutor did state that "each detail of Barres' statement about Pomares is corroborated by the lease, the hotel reservations, the trip to New York on Amtrak, the Crossway" (Tr. 624), it is apparent in context that that reference was to his statement as a witness.

7. Petitioners' contention that the trial court erred in admitting evidence of two narcotics sales not charged in the indictment is insubstantial. The indictment charged a conspiracy to distribute and to possess narcotic drugs with intent to distribute, taking place during the period from November 1, 1972, to August 10, 1973; it further charged petitioners with distributing seven kilograms of cocaine.

Evidence at trial detailed the initiation and operation of the cocaine ring run by petitioners and Barres. Included was testimony about sales of cocaine in August 1972 and April 1973. The April 1973 sale was evidence that directly proved the conspiracy charge and thus was unquestionably properly admitted. Evidence of the first sale, which took place before the period specified in the indictment, was relevant to proof of development of the conspiracy, and to the issue of petitioners' knowledge and intent, and was thus properly admitted. *United States* v. *Harrell,* 436 F.2d 606, 612 (C.A. 5); *United States* v. *Del Purgatorio,* 411 F.2d 84, 86-87 (C.A. 2); *United States* v. *Battaglia,* 394 F.2d 304, 313 (C.A. 7), vacated on other grounds *sub nom. Giordano* v. *United States,* 394 U.S. 310, adhered to after remand, 432 F.2d 1115, 1118-1119 (C.A. 7), certiorari denied, 401 U.S. 924; *Williamson* v. *United States,* 310 F.2d 192, 199 (C.A. 9); cf. *Lisenba* v. *California,* 314 U.S. 219, 227.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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